

APR 9 1996

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

J. BARON GROSHON
BY EDC
Deputy Clerk

In Re:)	Case No. 95-50708
)	Chapter 7
CHRISTINA H. BLACK)	
)	
Debtor.)	JUDGEMENT ENTERED ON APR 9 1996.
_____)	

ORDER

This matter comes before the Court upon the Trustee's Objection to the Debtor's Exemptions and Motion to Include the Debtor's 401(k) Account in the Debtor's Bankruptcy Estate. A hearing was held on the matter in Statesville, North Carolina on March 6, 1996. Based on that hearing and the Court's records, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Debtor filed a voluntary Chapter 7 Bankruptcy petition on October 10, 1995.

2. On Schedule C of her Bankruptcy petition, the Debtor listed \$4,667.48 held in her (employer's) 401(K) account, as being exempt under the Employee Retirement Income Security Act ("ERISA").

3. Subsequently, the Trustee filed an Objection to the Debtor's Exemption Election concerning the 401(k) account. The basis of the Trustee's Objection, as argued at the March 6 hearing, is his assertion that that Plan allows for normal withdrawals of fund assets by the Debtor for any reason at any time. Therefore, the Trustee argues the Plan is not subject to an anti-alienation provision as to the Debtor and is not excluded from property of the bankruptcy estate by section 541(c)(2) of the Bankruptcy Code.

4. Conversely, the Debtor argues that section 541(c)(2) of the Code acts to keep the Debtor's 401(k) interest out of the bankruptcy estate because the savings plan contains a general anti-alienation provision and states that its members are protected by ERISA. The Debtor supported this position by arguing that under the Supreme Court's holding in Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242 (1992), all funds held in ERISA qualified plans are excluded from property of the estate through section 541(c)(2).

CONCLUSIONS OF LAW

1. Generally, section 541 of the Bankruptcy Code makes "all legal or equitable interests of the debtor in property as of the commencement of the case" property of a debtor's bankruptcy estate. 11 U.S.C. § 541(a)(1).

2. However, there are narrow exceptions to this general rule. Section 541(c)(2) of the Code states that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). Courts have consistently held that this provision works to exclude any interest held in a spendthrift trust, qualified under state law, from the bankruptcy estate. See In re Leimer, 54 B.R. 587 (D. Neb. 1985). Further, this exclusion has been extended to interests held in ERISA qualified pension plans by the Supreme Court in Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242 (1992).

3. The key factor in the Supreme Court reaching their decision in Patterson was that ERISA qualified plans are required

to contain specific anti-alienation provisions under 29 U.S.C. § 1056(d)(1). This requirement allows the plans to fit into the exception provided by section 541(c)(2) of the Bankruptcy Code.

4. Therefore, the Court must determine, in the current case, whether the Debtor's First Union savings plan contains the necessary anti-alienation provisions to bring the Debtor's interest in the plan within the 541(c)(2) exclusion.

5. The only evidence of the details of the plan presented at the hearing was a plan summary showing that First Union's savings plan divides an individual's accumulated interest into several different accounts. A copy of the Debtor's savings plan statement indicates that, at the time of the filing of her petition, she had \$1,417.57 in the "Before-Tax Basic Account," \$807.68 in the "After-Tax Basic Account," and \$2,388.21 in the "Company Matching Account," for a total of \$4,667.46. She has claimed all of these funds exempt under ERISA in her bankruptcy schedules.

6. The First Union savings plan summary also indicates that four types of withdrawals may be made from the plan by a participant, depending on the type of account in which an individual keeps her interest. These four types of withdrawals include; normal, specified cause, hardship, and after age 59 and 1/2. Normal withdrawals may be made at any time and for any reason from an individual's After-Tax Supplemental Account or After-Tax Basic Account. In addition, a plan participant may make normal withdrawals from her Company Matching Account if the funds have been in the plan for two or more years. The only penalty for making withdraw-

als from these accounts is a six month suspension of an individual's right to make contributions to the plan. Withdrawals of funds earned after January 1, 1989 from a participant's Before-Tax Basic Account are only available after the individual reaches age 59 and 1/2.

7. Therefore, the Debtor in this case, may make normal withdrawals from her After-Tax Basic Account at any time and from her Company Matching Account at any time after the funds have been in the plan for at least two years. However, the Debtor is not allowed to make any withdrawals from her Before-Tax Basic Account until she reaches age 59 and 1/2.

8. While the First Union savings plan does contain a boilerplate "no alienation" clause, purporting to apply to the entire plan, based on the summary which has been presented to the Court, it is clear that the Debtor has unfettered discretion to reach the monies held in her After-Tax Basic Account and to reach the monies that have been in her Company Matching Account for at least two years. Therefore, the amounts held in these two accounts cannot be excluded from property of the estate by section 541(c)(2). The six month suspension from the plan, which is the only penalty for a withdrawal from one of these accounts, is not sufficient to raise these accounts to the level of a spendthrift trust as contemplated by section 541(c)(2). For a case holding similarly, see In re Putman, 110 B.R. 783, 801 (Bkrtcy. E.D. Va. 1990).

However, the amounts held in the Debtor's Before-Tax Basic Account are not reachable by Debtor for any reason until she

reaches age 59 and 1/2. This restriction is sufficient to satisfy the anti-alienation requirement found in section 541(c)(2) of the Bankruptcy Code.

9. Therefore, based on the plan summary, the monies being held in the Debtor's After-Tax Basic account are deemed to be property of the bankruptcy estate under section 541 of the Code and are available to the Trustee to satisfy the claims of creditors.

10. As to the amount being held in the Debtor's Company Matching Account, an argument could be made that to the extent the amount is represented by monies held in the account for less than two years, the account is excluded by section 541(c)(2) as being subject to an anti-alienation provision. However, the Debtor did not present any evidence on this point and consequently has not met her burden of proof to prove her entitlement to the exemption. As a result, the total amount held in that account is also deemed to be property of the estate and is available to the Trustee to satisfy the claims of creditors.

11. To the extent that she has avoidability under her "wildcard" exemption under North Carolina G.S. 1C-1601(a)(2), the Debtor may amend her exemptions to claim some of these monies as exempt.

IT SO ORDERED.

This the 9th day of April, 1996.


United States Bankruptcy Judge